No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SYLVIA COOPER, ET AL.
Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,
Respondent

and

PHYLLIS BAXTER, ET AL.
Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

GEORGE R. HODGES*
ROBERT D. DEARBORN
JULIA V. JONES
Moore, Van Allen and Allen
3000 NCNB Plaza
Charlotte, North Carolina 28280
Telephone: (704) 374-1300

Counsel for Respondent
Federal Reserve Bank of Richmond

**Counsel of Record*

TABLE OF CONTENTS

ABBREVIATIONS

"Petitioner" and "Plaintiff" refer to the EEOC, Cooper, Baxter, et al. collectively
"The Bank" refers to Respondent Federal Reserve Bank
"[page no.] a" refers to the Appendix filed by Petitioners
"FRCP" refers to the Federal Rules of Civil Procedure
"FRAP" refers to the Federal Rules of Appellate Procedure
"*EEOC and Cooper*" refers to the class action, No. 81-1536 below
"*Baxter*" refers to the subsequent individuals' action, No. 82-1259 below.

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This is a race discrimination in employment action. It was originally filed by the EEOC in 1976. Several months later Sylvia Cooper and three other individuals intervened as individuals and as representatives of the class of all black employees of the Respondent's Charlotte Branch office (hereafter "the Bank"). The case was certified as a class action. Class members were provided written notice of the class action. That Notice advised them: that they were class members; that they could either proceed as class members or could opt out of the class; and that they would be bound by the determination in the class action, whether favorable or unfavorable, if they did not opt out of the class action. No one involved here sought to opt out of the class or to intervene individually prior to announcement of the Distict Court's decision.

The Complaint and Complaint-in-Intervention alleged that the Bank had discriminated against the four individuals and against the class of blacks in initial job assignment, training, pay, discipline and promotions in all job Grades (the Bank had job Grades 3 through 16). After extensive discovery, the case was tried to the District Court sitting without a jury in 1980. Shortly after the trial, the District Court issued a "Memorandum of Decision." [191a]. The District Court's Memorandum of Decision concluded that the Bank had discriminated only against two of the four individual claimants (Sylvia Cooper and Constance Russell) and only in promotions out of Grades 4 and 5, but not in other respects. The Memorandum of Decision also directed plaintiffs' counsel to prepare proposed findings of fact and conclusions of law. Plaintiffs' (actually the Intervenors') counsel prepared and submitted such proposed findings and the Bank filed a response to them. But, the District Court adopted the plaintiffs' proposed findings virtually verbatim.

About four months after entry of the Memorandum of Decision, Phyllis Baxter and several other class members who were not in the part of the class that was awarded relief (*i.e.* blacks in Grades 4 and 5) sought to intervene in the class action. Intervention was denied. Baxter and the others then filed a separate action alleging individual claims of discrimination. The Bank moved to dismiss that action.

The Motion was denied, but the District Court certified the question for interlocutory appeal.

The Bank appealed those portions of the *EEOC and Cooper* judgment that were adverse to it and also appealed the District Court's refusal to dismiss the *Baxter* action. Neither the EEOC nor the private plaintiffs appealed from the portions of the judgment adverse to them.

On appeal, the Fourth Circuit Court of Appeals reversed the District Court's rulings against the Bank in *EEOC and Cooper* and in the *Baxter* action. The Fourth Circuit "disapproved" of the District Court's practice of adopting counsel-prepared findings of fact, but concluded that the District Court's findings in *EEOC and Cooper* were clearly erroneous because they were based on flawed statistical analysis, were not supported by substantial evidence and ignored much evidence in the Record. The Fourth Circuit also reversed the *Baxter* ruling as a matter of law. The private plaintiffs petitioned the Fourth Circuit for rehearing, but rehearing was denied by an equally divided Court. The EEOC did not participate in the petition for rehearing or in this petition.

Petitioners here raise three procedural issues: (I) Whether the class action judgment bars the *Baxter* action; (II) Whether the adoption of counsel-prepared findings is proper; and (III) Whether the Fourth Circuit's decision is consistent with *Pullman-Standard v. Swint*.

RESPONSE TO PETITION FOR CERTIORARI

Summary of Response

I. The Fourth Circuit's decision dismissing the *Baxter* action was a proper application of principles of res judicata and FRCP Rule 23. That decision was consistent with the decisions of other Circuits which have considered the issue.

II. The Fourth Circuit's criticism of the District Court's adoption of counsel-prepared findings is purely a matter of *preference* and did not influence the standard on which those findings were tested. The

Fourth Circuit tested the findings by the "clearly erroneous" standard of FRCP Rule 52(a). In so doing it acted consistently with the directions of this Court and with the other Circuit Courts.

III. The Fourth Circuit's reference to a finding of "ultimate fact" related only to the Distict Court's Memorandum of Decision which did not purport to be FRCP Rule 52 "findings" at all, and did not relate to the actual "findings of the District Court". So, the decision comports with *Pullman-Standard v. Swint*.

I.

The Fourth Circuit's Decision That Class Members' Subsequent Individual Actions are Barred by the Adverse Class Action Judgment is Consistent with the Rulings of this Court and Other Circuits

The Fourth Circuit held that Petitioners' individual claims in the *Baxter* action were barred by the judgment adverse to their class in the *EEOC and Cooper* class action based upon principles of res judicata and FRCP Rule 23. In that decision, the Fourth Circuit acted consistently with other Circuits by enforcing the binding effect of the class action judgment. The *Baxter* plaintiffs were not denied their day in court, as Petitioners claim. Rather, they knowingly elected to litigate their claims via the class action, and they are bound by that election.

A. The Fourth Circuit's decision is entirely consistent with the decisions of other Circuit Courts which have considered this issue. The Fourth Circuit's opinion itself recognizes that its decision is consistent with two of its prior decisions and another of the Fifth Circuit. [177a]. *Dalton v. Employment Sec. Comm'n.*, 671 F.2d 835 (4th Cir. 1982), *cert. denied*, 74 L.Ed.2d 117 (1982); *Woodson v. Fulton*, 614 F.2d 940 (4th Cir. 1980); *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979). It is also consistent with the decisions of the Circuit Courts in other cases: *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (6th Cir. 1979); *Jones v. Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980); and *Dosier v. Miami Valley Broadcasting Corp.*, 625 F.2d 1295 (9th Cir. 1981).

The Petitioners seize on statements in *Dickerson v. U.S. Steel Corp.*, 582 F.2d 827 (3rd Cir. 1978), for their assertion that having elected to participate as class members in the class action (which was unsuccessful), they now get a second chance to litigate their claims. [Pet. 12]. The statements relied on by Petitioners are mere dictum, and were specifically recognized as such by the Fourth Circuit. [182a-183a]. Plus, as the Petitioners would interpret it, that dictum is simply wrong and has not been adopted by any Circuit Court, including the Third Circuit Court which penned the dictum in the first place.

The actual holding of *Dickerson* was that non-named class member witnesses who had not satisifed jurisdictional prerequisites (such as Petitioners) may not be entitled to relief for an individual claim of discrimination if the class-wide claim encompassing their individual claims is dismissed. 582 F.2d at 834. The Circuit Court, in dictum, volunteered that there was not such commonality in the class and individual claims as to support res judicata. But, that Court no where authorized a subsequent separate lawsuit such as these petitioners attempt here.

Thus, a proper reading of *Dickerson* is that a class member (such as Petitioners) who wants to pursue relief on his personal claims in a bifurcated class action should satisfy the jurisdictional prerequisites and intervene in the class action. As the Fourth Circuit recognized, that is precisely how the Third Circuit *en banc* has subsequently interpreted *Dickerson*. *See Croker v. Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981). Respondent has found *no case* that has interpreted *Dickerson* to authorize a subsequent individual suit by unsuccessful class members (and Petitioners have suggested none). In fact, the Seventh Circuit has cited *Dickerson* in denying relief to a non-party witness where classwide discrimination was not present. *See Clark v. Chrysler Corp.*, 673 F.2d 921, 929 (7th Cir. 1982). So, the Fourth Circuit's rejection of the dictum in *Dickerson* is proper and is consistent with other decisions involving this narrow issue. *See Dalton, Woodson, Kemp, Fowler, Dosier, supra.*

Petitioners improperly cite *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), in support of their position. That case involved a prior

class action in which the plaintiffs were seeking *only* equitable relief from the general prison conditions such as segregated and unsanitary facilities. In his subsequent individual suit, Bogard sought damages for particular acts of physical punishment and abuse directed at him, some of which occurred after the record was closed in the class action. Thus, the thrust of the two actions was not the same. In addition, Bogard's individual claims were for damages against certain prison officials for *specific acts*, whereas the class action had been directed at the Governor and other officials who had the power to change *policy* at the prison. The Circuit Court also specifically held that the class notice was insufficient to alert prisoners to the possibility that they could seek individual money damages for personal wrongs as well as equitable relief. 586 F.2d at 408. Here, Petitioners were given adequate notice and the cause of action was the same in the class action and the subsequent individual action. So *Bogard* offers no support to Petitioners.

Petitioners also cite *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Like *Bogard*, that case involved a totally different situation than presented here. In fact, the Circuit Court there emphasized that res judicata was not a bar because there had been no notice to class members:

> ...because the agreement concerning the presentation of individual claims occurred only after trial thus prohibiting any form of notice to the claimants that such claims might be waived, it seems evident that class members whose claims were not actually litigated should not be estopped by res judicata.
> [602 F.2d at 1298 (Citations omitted)].

Again, lack of adequate notice prompted the Circuit Court to state in dictum that individual claims may not be barred by the findings related to the class action. However, that is not the case here. As noted below at pp. 7-8, here Petitioners had specific written notice of their options in the class action and the consequences of each option. Consequently, *Marshall* does not support Petitioners' position.

Finally, Petitioners rely on *Eastland v. T.V.A.*, 704 F.2d 613 (11th Cir. 1983) (Petition for Rehearing granted in part), for the position that individual class members can prevail on their claims

even where there is a finding of no class discrimination. No Court, including the Fourth Circuit, has held otherwise. What Petitioners fail to point out is that the District Court in *Eastland, prior* to trial ruled that, while Eastland was not an appropriate representative for the class, his *individual claims* could be consolidated with the class action for trial. So, *Eastland* has nothing to do with the issue present here; and the Fourth Circuit's decision here is not inconsistent with it.

Not only do the cases cited by Petitioners not support their position, they have conveniently ignored the numerous cases from other Circuits which are consistent with the Fourth Circuit's holding and which were included in briefs filed in the Fourth Circuit. See *Dalton, Woodson, Kemp, Fowler, Dosier, supra.*

B. The Fourth Circuit's decision is completely consistent with decisions of this Court. The cases cited by Petitioners, *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), *Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), authorize bifurcated trials in class actions. They involve the situation where an individual, at Stage II of the class action, obtains the advantage of a presumption of liability on his claim created by a finding of class discrimination at Stage I. Unless the employer can rebut that presumption at Stage II, the individual claimant will prevail. There is nothing inconsistent in those cases with the Fourth Circuit's decision here. In all instances, the class members are bound by the results of the class action. If there is a finding of class discrimination, then they receive the benefit of the presumption and the defendant is bound by that finding. Likewise, the claimants are bound if the Stage I decision is adverse. No decision of this Court authorizes class members to emerge from an *unsuccessful* class action and commence a subsequent series of individual suits.

Petitioner's assertion that *Connecticut v. Teal*, 457 U.S. 441 (1982), governs this case misses the crucial issue here entirely. There, this Court recognized that, even though an employer's "bottom line" promotion statistics were even-handed, there may be

individual instances of discrimination. That is true, but it is not the issue here. The issue here is whether Petitioners who elected to litigate their claims via the class action are bound by that election when the class action judgment is adverse to them. So, *Teal* has nothing to do with this case; and the Fourth Circuit's decision is not inconsistent with it.

C. Petitioners knowingly elected, after adequate notice, to pursue their individual claims as non-named class members in the *EEOC and Cooper* class action. Having pursued their claims via that vehicle, the Fourth Circuit's holding that they are bound by the adverse decision in that action is entirely consistent with principles of res judicata and FRCP Rule 23. The Fourth Circuit's decision does not deprive them of an opportunity to litigate their claims. It simply recognizes that they *have had that opportunity* and were not successful.

The fact is that these petitioners were formally notified of their options and they chose to litigate their claims via the *EEOC and Cooper* class action — and they were satisfied with that election until four months after they learned they were not successful. These petitioners were each personally notified that they were class members, that they could opt out of the class to pursue their individual claims, or that they could remain as class members, in which event they would be *bound by the class action whether favorable* or *unfavorable to the class*. With that knowledge, Petitioners chose to litigate their claims as non-named class members. Having made that election, they are bound by its result.

That result is particularly reasonable in this case because:

— these plaintiffs had never filed charges of discrimination with this EEOC;

— they were given *four years* notice of the opportunity to pursue their claims individually;

— they never moved to intervene in the class action even though their counsel had intervened on behalf of four other individuals and the Bank had not opposed that intervention;

— they were listed as potential discriminatees in Answers to Interrogatories during discovery in the class action, but never made any attempt to intervene or assert individual claims;

— they, through counsel, consented to a bifurcated trial of the class action;

— they first "appeared" in the class action on a witness list filed three days prior to the trial, but did not attempt to intervene even then;

— they testified at the trial of the class action, but made no attempt to intervene; and

— they made no attempt to assert their personal claims until about *four months* after they learned that they had not been successful in the class action.

Petitioners now assert that the Fourth Circuit denied them a chance to litigate their claims. But, the fact is that *they* made the election and were satisfied to litigate their claims as non-named class members in the *EEOC and Cooper* class action for over *four years*, through trial and thereafter until they found that the judgment was against them. The Fourth Circuit's decision follows FRCP Rule 23 and principles of res judicata in holding that the petitioners are bound by the class action judgment.

D. The Fourth Circuit's decision is also consistent with FRCP Rule 23 as specifically amended in 1966 to bind class members by the class action judgment and to prevent the very "one-way intervention" the petitioners attempted here.

FRCP Rule 23 itself provides that the judgment in a class action shall include all class members "whether or not favorable to the class." In *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974), this Court noted that prior to 1966 the Rules permitted the practice of "one-way intervention", or "allow[ing] class members to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." 414 U.S. at 547-48. The Court noted that Rule 23 was amended in 1966 *to eliminate that abuse*, and explained the current Rule 23 consequences as follows:

> Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. *Thereafter they are either nonparties to the recovery or to be bound by the judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.*
> [414 U.S. at 549 (Emphasis added)].

The Fourth Circuit in *Woodson v. Fulton, supra*, recognized the purpose of class actions and the importance of the binding effect of their judgments:

> The record shows that Woodson was a member of the class, had ample notice, and was ready and willing to use the class action to obtain his recovery in the event his personal action failed. I think we ignore important policies underlying class actions when we allow plaintiff, in effect, to present his claim in two simultaneous lawsuits and choose the one yielding the better result.
> [614 F.2d at 943 (Hall, J., concurring in part and dissenting in part)].

The same notion was recognized by the Fifth Circuit in *Kemp, supra*. So, the Fourth Court's ruling that these petitioners are bound by the judgment in the class action is entirely consistent with the language and the purpose of Rule 23.

The practical consequence of the relief sought by Petitioners would destroy the class action. Their argument is that: although they were class members who appeared and testified in furtherance of the *EEOC and Cooper* class action, after they discovered their class had been unsuccessful, they are entitled to file subseqent individual actions to pursue their claims. There is nothing to distinguish these plaintiffs from any other class members. So, taken to its logical extent, their argument would mean that: if an employer-defendant in a class action was completely successful and defeated the class

action totally, it would nevertheless be subject to further suits by *each and every class member* on their "individual claims." Such a result would render FRCP Rule 23 meaningless.

Petitioners suggest that there is great risk of "massive intervention" because, supposedly, no class member would "risk" the class determination. But, that actually is unlikely. For example, in the *EEOC and Cooper* action itself each class member—including Petitioners—was personally given explicit notice of their options in the class action and that, if they chose to proceed as class members, they would be bound by the class judgment "whether favorable or unfavorable." That is essentially the same message as the Fourth Court's decision. But, there was no "massive intervention" in *EEOC and Cooper*. Even these petitioners, who had testified at the trial, did not seek to intervene until four months *after* they learned they had lost in the class action. Moreover, there are also "risks" inherent in a class member's decision to pursue his claims *individually*. For example, Elmore Hannah was named intervenor in *EEOC and Cooper* and was in the class that was *successful* in the District Court, but he had elected to pursue his *individual* claims, and the District Court found *against* him. Finally, if any "massive intervention" were to occur, the Courts are equipped to deal with that situation just as they are to manage any other litigation.

In conclusion, there is no conflict between the Fourth Circuit's decision and the decisions of other Circuit Courts or of this Court; after explicit written notice, the Petitioners elected to pursue their claims via the vehicle of the class action; and the Fourth Circuit's decision properly bound Petitioners to their election; and that decision is consistent with the purpose and letter of FRCP Rule 23 and principles of res judicata.

II.

The Fourth Circuit's "Disapproval" Of The District Court's Adoption Counsel-Prepared Findings Of Fact Does Not Merit Review By This Court.

The Fourth Circuit in this case "disapproved" of the District Court's virtual verbatim adoption of findings of fact prepared by Petitioners' counsel. Petitioners cite a number of cases in which Circuit Courts make varying comments about the propriety of that practice, and suggest that this Court resolve those differences in approach among the Circuits. The Bank submits that this issue does not merit review by this Court for the following reasons: (A) This Court has spoken clearly and unambiguously on this issue. (B) The "conflict" among the Circuits, if any, relates only to a matter of "preference" in the nature of a "local rule" on which uniformity is not required. (C) Regardless of their opinions about the propriety of adopting counsel-prepared findings of fact, no Circuit Court has held that to be reversible error in itself and all Circuit Courts have properly applied the "clearly erroneous" standard of FRCP Rule 52(a) to the District Courts' findings, regardless of their source. (D) Here, the Fourth Circuit "disapproved" of the adoption of counsel-prepared findings, but it expressly applied the "clearly erroneous" standard of Rule 52(a) to those findings and reversed the District Court only because it concluded that the findings were not supported by substantial evidence and, thus, were "clearly erroneous."

A. This Court spoke on the propriety of adopting counsel prepared findings of fact in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). There, the Court stated that:

> Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.... Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.
> [376 U.S. at 656 (Citations and footnotes omitted)].

After making that observation, the Court went on to reverse the judgment below, not because the findings were prepared by counsel,

but because the evidence did not support the judgment. *Id.* So, the pattern of analysis established by this Court in *El Paso* is: regardless of the source of the findings of fact, they are the findings of the District Judge and should be tested against the substantial evidence in the Record. That pattern has been consistently followed in each of the cases cited by Petitioners [Pet. 19-38] and was followed by the Fourth Circuit in this case.

B. The differences in approach to counsel-prepared findings among the Circuits relate to a matter of "preference" as to form on which they are permitted to differ. Rule 47 of the Federal Rules of Appellate Procedure permits Circuit Courts to adopt "local rules" not inconsistent with those Rules. The Bank submits that that is all the different comments about counsel-prepared findings amount to — local rules of preference or practice. Analysis of each of the cases cited by Petitioners [Pet. 19-38] discloses that, regardless of what comment the Circuit Courts made about the practice of adopting counsel-prepared findings, the Courts applied the "clearly erroneous" standard of Rule 52(a) to those findings. Since the *test* applied is the Rule 52(a) standard and not the *source* of the findings, any comment about adoption of counsel-prepared findings cannot be the legal test, but must be something less — a local rule of preference or practice.

Pursuant to FRAP Rule 47 and 28 U.S.C. §2071, the Circuit Courts have the general supervisory powers to regulate practices regarding such diverse matters as: restriction of the use of supplemental instructions, *United States v. Cheramie*, 520 F.2d 325 (5th Cir. 1975); administration of mandamus authority, *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); and promulgation of rules to "regulate the practice of the court and to facilitate the transaction of its business," *Washington-Southern Nav. Co. v. Balto. and Phil. Steamboat Co.*, 263 U.S. 629, 635 (1924). The varying comments by the Circuit Courts do not purport to be substantive rules of law, but are merely statements of preference or direction to "regulate the practice of the court and facilitate the transaction of its business." *Id.* Consequently, the Circuit Courts are free to differ in their practice regarding adoption of counsel prepared findings.

Moreover, upon analysis of the cases cited by Petitioners, the apparent divergence in approval and disapproval of the practice at issue largely disappears. In fact, virtually all of the cases Petitioners cite for favoring counsel-prepared findings [Pet. 20-23] are unusual patent, copyright or admiralty cases. In fact, Petitioners selectively quote from one case as favoring the practice, but conveniently fail to note that the case is a patent case which itself limits its approval to cases where the evidence is "highly technical." *Scheller-Globe Corp. v. Milsco Mfg. Co.*, 636 F.2d 177, 178 (7th Cir. 1980) (...the procedure can be of considerable assistance to a trial court *where the evidence is highly technical.")* [Emphasis added to language omitted by Petitioners at Pet. 22]. So, except for the limited exception of "highly technical" patent, copyright and admiralty cases, the very cases cited by Petitioners show that the practice of adopting counsel-prepared findings has received generally negative reception by the Circuit Courts — just as it did in this Court in *El Paso* (judge drawn findings would have been "more helpful"). 376 U.S. at 656.

In like manner, Petitioners' assertion of a "complete reversal" in the Fourth Circuit's approach to counsel-prepared findings is simply a product of a misquote. [Pet. 26]. Petitioners assert that the Fourth Circuit originally favored the practice in *The Severance*, 152 F.2d 916 (4th Cir. 1945), by quoting the Court as follows: "'[t]his practice is not to be condemned.'" [Pet. 26]. But, the Fourth Circuit actually stated: "This practice is not to be *commended*." 152 F.2d at 918 (Emphasis added). So, the present case is consistent with the position of the Fourth Circuit dating back to 1945 and with other Circuits in all but "highly technical" patent, etc. cases.

The extent of favor or disfavor of the practice in the cases cited by Petitioners varies in degree. But, this is explained by the varying circumstances of the cases. While the practice of adopting counsel prepared findings may be properly favored as of "considerable assistance" in "highly technical cases" *Scheller-Globe, supra*, it is not inconsistent to find the practice "disapproved" in a case such as this one where it resulted in findings of discrimination based on patently contrived statistical evidence, promotion of one individual to a job she never sought (by her own testimony) and promotion of

another individual to supervise the operation of a machine she admitted she had never fully learned to operate, and the exclusion from consideration of virtually all of the Bank's evidence. See discussion at pp. 16-17, *infra*. The cases cited by Petitioners are not *conflicting;* they result from a consistently applied principle to dissimilar circumstances.

Finally, it is important to bear in mind that no court has considered the practice of adopting counsel-prepared findings significant enough to reverse the findings on that account. The practice is simply an administrative matter for the Circuits to police as they deem appropriate.

C. Petitioners acknowledge that "no court regards the practice [of adopting counsel-prepared findings] as reversible error." [Pet. 28]. In fact, in the cases cited by Petitioners, whether or not the practice is greeted with favor or disfavor, the Courts consistently apply the "clearly erroneous" standard of FRCP Rule 52(a).

For example: *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 570 F.2d 554 (6th Cir. 1977), is cited by Petitioners as approving the practice. There the Circuit Court stated that:

> The question is whether the factual findings and conclusions of law adopted by the Court are supported by substantial evidence, and if they are, it makes no real difference which counsel submitted them.
> [570 F.2d at 558].

The Circuit Court then affirmed the findings because they were supported by substantial evidence. *Id.* In *Schwerman Trucking Co. v. Gartland Steamship Co.*, 496 F.2d 466 (7th Cir. 1974), also cited as favoring the practice, the Circuit Court noted that:

> "...The challenged findings are not clearly erroneous. We think the factual basis for the ultimate conclusion arrived by the district judge is clearly manifested by the record, regardless of who composed the words and phrasing entered below."
> [496 F.2d at 475 (quoting *Penn-Texas Corp. v. Morse*, 242 F.2d 243, 247 (7th Cir. 1957)].

In *Askew v. United States*, 680 F.2d 1026 (8th Cir. 1982), the Circuit Court "disapprove[d]" of the practice, following *El Paso*, but it held that the findings "will stand if supported by evidence" and affirmed the judgment below. 680 F.2d at 1209. In *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974), the Circuit Court "condemned" the practice, but reversed only because the "objective facts" required reversal. 503 F.2d at 1295. In *Roberts v. Ross*, 344 F.2d 747 (3rd Cir. 1965), the Circuit Court "disapprove[d]" the practice, but reversed the judgment only because the "findings necessary to support the judgment are lacking." 344 F.2d at 752-53. Analysis of the other cases cited by Petitioners demonstrates a similar and consistent adherence to the "clearly erroneous" standard in affirming or reversing the judgment below, regardless of whether the practice of the lower court was favored or disfavored.

The D.C. Circuit summarized the basic principle at work in these cases in *Schilling v. Switzer-Cummins Co.*, 142 F.2d 82 (D.C. Cir. 1944):

> If inadequate findings result from improper reliance upon drafts prepared by counsel — or from any other cause — it is the *result* and not the *source* that is objectionable.
> [142 F.2d at 83 (Emphasis added)].

Consistently, the determining factor in whether the Circuits reverse or affirm the District Court's judgment has been whether it was supported by substantial evidence, and not the "source" of the findings — even in those cases where the Circuit Court disapproved of that "source."

D. The Fourth Circuit applied the "clearly erroneous" standard of FRCP Rule 52(a) in this case. The Fourth Circuit specifically noted that: "The adoption by the District Court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause *per se* nor does it mean that the 'clearly erroneous' rule of Rule 52(a) will not be applied at all..." [21a]. However, because of the circumstances of this case, the Fourth Circuit felt that the adopted findings called for "more careful scrutiny." [23a].

In this particular case the Circuit Court was led to more carefully scrutinize the "adopted findings" because the Record demonstrated that they were supported by insufficient or flawed evidence, they wholly ignored much contrary uncontroverted evidence, or in some instances they were wholly baseless. Petitioners now accuse the Fourth Circuit of "de novo appellate review" and "independent fact-finding." [Pet. 32, 36]. But, the fact is that, because of the gross error and insufficiency of Petitioners' proposed findings adopted by the District Court, FRCP Rule 52(a) *required* the detailed analysis of those findings by the Circuit Court.

The deficiencies of the adopted findings are all noted at length in the Fourth Circuit's opinion. Examples of some of these deficiencies noted by the Fourth Circuit illustrate the need for a careful review of the adopted findings: (a) With respect to the finding of discrimination in promotions out of Grades 4 and 5: The adopted findings purported to rely on the personal examples of ten class-member witnesses. But, of the ten, only *two* had not been promoted out of Grades 4 and 5, and one of those two was specifically found not to have been discriminated against. [34a-38a]. The adopted findings also were based on statistical exhibits which did not include the actual number of promotions involved and about which the Petitioners' own expert admitted his choice of methodology "changed the statistics dramatically." [56a-59a]. Moreover, the adopted findings ignored virtually all of the statistical and other evidence offered by the Bank. [117a-123a].

(b) With respect to the findings of discrimination against Constance Russell: The adopted findings found she had been unlawfully denied a Grade 7 job, even though her own testimony was that all she had sought was a Grade 6 job (and she got that). [130a-134a]. The adopted findings also found that Russell had been given an unfair performance appraisal because she had filed a Charge of Discrimination, even though Russell herself acknowledged that the appraisal was made *before* she filed her Charge. [144a]. Finally, regarding her discharge for absenteeism, the adopted findings ignored the undisputed facts that the comparable employees who were not fired had improved their records whereas Russell had not,

that the other white employee whose record did not improve was also fired, but that she was not offered a transfer that was offered to Russell. [145a-146a].

(c) With respect to the findings of discrimination against Sylvia Cooper: The adopted findings found Cooper qualified to *supervise* the operation of a Reader-Sorter machine, even though Cooper herself admitted that she could not fully operate the machine and that earlier she had asked to be relieved from training on the machine. [161a-166a]. The adopted findings also found that Cooper had been constructively discharged, notwithstanding a total absence of any evidence of any intent by the Bank to force her to quit (and in the face of ample evidence to the contrary). [169a]. For additional examples of deficiencies in the adopted findings see the opinion of the Fourth Circuit at 34a-38a, 56a-83a, 117a-123a, 130a-140a, and 161a-169a.

These erroneous, unsupported and often baseless findings adopted by the District Court, apparently without scrutiny, required that the reviewing Appellate Court carefully scrutinize the findings.

Notwithstanding the pervasive error in the counsel-prepared findings, the Fourth Circuit properly tested the findings on the "clearly erroneous" standard of Rule 52(a). That standard has been defined by this Court as follows:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.
> [*United States v. U.S. Gypsum*, 333 U.S. 364, 395 (1948)].

The Fourth Circuit announced the standard it applied in virtually identical language:

> . . . when, the reviewing court, on the entire record, "is left [after making such review] with the definite and firm conviction that a mistake has been committed," . . . or it is convinced that "the result in a particular case does not reflect the truth and right of the case," . . . it is *the duty*

> of the appellate court to reverse the findings and conclusions *as clearly erroneous*.
> [24a (Emphasis added and citations omitted)]

True to Rule 52(a), the Fourth Circuit then proceeded to apply the "clearly erroneous" standard to each segment of the District Court's adopted findings: (a) Regarding the finding of discrimination in promotions out of Grades 4 and 5, the Appellate Court found the District Court's reliance on the testimony of class number insufficient as a matter of law. [34a-35a; 38a]. It further concluded that the District Court committed "clear error" in relying on "skewed analyses" which "disregarded the far more reliable tables." [116a]. And, finally it concluded that the District Court's findings were "not supported by any substantial evidence" either live or statistical and that the findings were "clearly erroneous without any substantial support in the record." [128a-129a].

(b) Regarding the findings that Russell had been discriminated against, the Fourth Circuit concluded that there was "no basis or justification for such a finding in this Record" [135a]; that the "findings of the District Court to the contrary simply have no support in the record" [144a]; that it was "unable to find any substantial evidence to support a finding . . ." [150a]; and that there was "no evidence of pretext . . . and beyond question there was no racial bias involved." [153a].

(c) Regarding the findings that Cooper had been discriminated against, the Fourth Circuit concluded that "There is simply not any evidence in this case of any racial motivation in the defendant's act of preferring Morgan over Cooper . . ." [160a]; and that "Cooper failed entirely to meet this burden [of showing pretext] and the finding of the District Court to the contrary is without substantial support in the record and was clearly erroneous." [167a]. The Fourth Circuit also concluded that there was "no basis in the record for a finding of constructive discharge;" [168a] that there was "absolutely no evidence" that the defendant sought to force Cooper to quit and the "evidence was quite to the contrary" [169a]; and that there was "nothing to support a finding of discriminatory purpose." [171a].

So, the analysis of the Fourth Circuit's opinion itself demonstrates that it properly applied Rule 52(a)'s "clearly erroneous" standard to the findings of the District Court (regardless of their source) and reversed the District Court only because it found those findings "clearly erroneous." In so doing the Fourth Circuit acted properly and consistently with the direction of this Court and the decisions of the other Circuit Courts.

III.

The Fourth Circuit's Decision Comports With *Pullman-Standard v. Swint.*

Petitioners contend that the Fourth Circuit violated the Court's recent dictates in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). There, this Court rejected the Appellate Court's refusal to apply Rule 52(a) to findings of "ultimate fact." The Fourth Circuit's opinion here did make reference to a finding of "ultimate fact." [15a]. But, that reference was limited to the District Court's three-page "Memorandum of Decision" — not its subsequent "Findings of Fact and Conclusions of Law." The District Court's Memorandum of Decision did not even purport to be the Court's Rule 52(a) "findings." In fact, the Memorandum of Decision itself ordered that such "findings" be prepared by plaintiffs' counsel and submitted to the Court. So, the Fourth Circuit's reference to findings of "ultimate fact" was directed at the Memorandum of Decision which was not a "finding" at all. As to the actual "findings" subsequently adopted by the District Court, the Fourth Circuit properly applied the Rule 52(a) "clearly erroneous" standard — as demonstrated above at pp. 16-18 *supra*. So, the Fourth Circuit's opinion was faithful to the dictates of *Pullman-Standard v. Swint.*

CONCLUSION

The Bank submits that the Petition for Certiorari should be denied for the reasons that: (I) There is no conflict among the Circuit Courts about the binding effect of a class action judgment and the Fourth Circuit properly applied the principles established by this Court in *American Pipe and Constr. Co. v. Utah;* (II) There is no conflict among the Circuits about application of the "clearly erroneous" standard of FRCP Rule 52(a), regardless of how the District Court's findings were prepared; and (III) The Fourth Circuit followed this Court's dictates of *Pullman-Standard v. Swint.*

Respectfully submitted this 3rd day of October, 1983.

GEORGE R. HODGES*
ROBERT D. DEARBORN
JULIA V. JONES
Moore, Van Allen and Allen
3000 NCNB Plaza
Charlotte, North Carolina 28280
Telephone: (704) 374-1300

Counsel for Respondent
Federal Reserve Bank of Richmond
**Counsel of Record*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served other parties in this action by causing three copies each of the foregoing Respondent's Brief in Opposition to Petition to be deposited in the United States Mails, postage prepaid and properly addressed to:

J. LeVONNE CHAMBERS, ESQ.
Chambers, Ferguson, Watt, Wallas, Adkins & Fuller
Suite 730 E. Independence Plaza
951 South Independence Blvd.
Charlotte, N.C. 28202

ERIC SCHNAPPER, ESQ.
Suite 2030
10 Columbus Circle
New York, New York 10019

REX LEE, SOLICITOR GENERAL
% Harriet Shapiro, Esq.
Office of the Solicitor General
Washington, D.C. 20530

This 3rd day of October, 1983.

/s/ GEORGE R. HODGES
George R. Hodges